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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 599

LEA COUNTY ELECTRIC COOPERATIVE, INC., a corporation,

and

CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation, *Petitioners,*

v.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT NEW MEXICO ELECTRIC SERVICE COMPANY IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of New Mexico was filed March 14, 1966, Appendix A; R. 1435-A, and is reported at 415 P. 2d 556. It will be included

in Volume 76 N.M. when published. It is attached to the Petition for Writ of Certiorari as Appendix A, p. 33. Motion for rehearing was denied without opinion on July 1, 1966 (R. 1435-M).

JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico for the following reasons:

1. The constitutional questions raised by the Petition for Writ of Certiorari were first presented to the Supreme Court of New Mexico by Motion for Rehearing after the opinion had been written (R. 1317, 1330, 1374). The Motion for Rehearing was denied without opinion (R. 1435-M), and the opinion of the Supreme Court was based upon the same construction and application of New Mexico law as the opinion of the District Court (R. 749-759).

2. The issues involved are local in nature, applicable only in the State of New Mexico, and the Judgment rests upon an adequate non-federal basis.

QUESTION PRESENTED

Whether or not the decision of the Supreme Court of New Mexico violated Petitioners' rights under the Constitution of the United States by impairing the obligations of contract under the provisions of Article I, Section 10 of the Constitution of the United States, or deprived Petitioners of property and of equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

It is deemed necessary to correct substantial inaccuracies in the statements contained in the Petition for Writ of Certiorari.

The record does not disclose that the Supreme Court of New Mexico "was persuaded" to "condone" any "piracy." The Findings of Fact of the trial court are set out in Appendix A to the Petition for Writ of Certiorari, beginning at Page 34. Those findings were held by the Supreme Court of New Mexico to have been properly made under the testimony in this case. The decision here as in the Supreme Court of New Mexico must rest upon these ultimate findings. The findings are as follows:

"FINDINGS OF FACT

1. Under date February 25, 1953, the Public Service Commission of New Mexico issued to New Mexico Electric Service Company a Certificate of Convenience and Necessity authorizing it to construct and operate a public utility system for the generation and supplying of electric power in a large area which embraces most of the south half of Lea County, and including Section 21, Township 17 South, Range 32 East, N.M.P.M., in Lea County, New Mexico.

2. Under the undisputed evidence in the record, in the latter part of 1960 a request was made of New Mexico Electric Service Company by Continental Oil Company to provide it with public electric utility service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico.

3. Under the undisputed evidence in the record, New Mexico Electric Service Company entered into a

contract with Continental Oil Company to provide it with electric service required by said company at said point. The service so to be provided was for the purpose of water flooding and use in the pumping of oil wells in the area included in Township 17 South, Ranges 32 and 33 East, all of which is within the area included in the Certificate of Convenience and Necessity issued to New Mexico Electric Service Company.

4. There is no evidence whatever in the record before the Public Service Commission of New Mexico that any demand to provide electric utility service to any person in Townships 16 and 17, Ranges 32 and 33 East has ever been made of New Mexico Electric Service Company before the request of Continental Oil Company.

5. There is no evidence in the record that New Mexico Electric Service Company has not at all times since the issuance of said Certificate provided public electric utility service to all persons within the area of the Certificate upon demand therefor.

6. New Mexico Electric Service Company, under the undisputed evidence in the record, within one year from the date of the issuance of the Certificate of Convenience and Necessity began the construction and extension of its plant, line, system, works and facilities of the utility throughout the area of its Certificate in good faith, and has prosecuted the same with reasonable diligence from the date of the issuance of the Certificate to the date of the hearing before the Public Service Commission of New Mexico from which this appeal was taken.

7. Under the undisputed evidence in the record, upon request by Continental Oil Company for service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico, New Mexico Electric Service Company contracted to provide said service, purchased the necessary equipment

therefor, and is ready, willing and able to perform the service.

8. There is no substantial evidence in the record from which the Public Service Commission of New Mexico could find that New Mexico Electric Service Company had not at all times constructed and extended the public utility system authorized in its Certificate of Convenience and Necessity within the area of the Certificate and within the area involved in this action in good faith and with reasonable diligence.

9. Under the undisputed evidence in the record there are no facilities in the area owned by any of the parties to this action which are sufficient to provide the electric utility service required by Continental Oil Company, and it will be necessary to construct the facilities necessary to provide the amount of service required by it under the undisputed evidence before the Commission."

Among other assertions contained in the Petition for Writ of Certiorari the assertions that New Mexico Electric Service Company had failed to comply with the provisions of its Certificate of Convenience and Necessity; that New Mexico Electric Service Company would not render service in the area of its certificate; that New Mexico Electric Service Company did not exercise its Certificate of Convenience and Necessity; and that the decision in the case results in the confiscation of Petitioners' property are either not supported by any evidence in the case or are contrary to the undisputed evidence in the case.

ARGUMENT

I.

Certiorari Will Not Issue to Review a Decision of a State Court of Last Resort on Constitutional Issues Presented for the First Time on Motion for Rehearing.

An unbroken line of decisions of this Court hold that certiorari will not issue to review a decision of the court of last resort of a state upon Federal constitutional questions that were not presented to the state court until motion for rehearing after final opinion. Typical of these cases is the case of *American Surety Company* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298. The Court there said:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil & Development Co. v. Arnaudet, 199 U.S. 182, 193, 50 L. ed. 143, 149, 26 S. Ct. 41; Godchaux Co. v. Estopinal, 251 U.S. 179, 181, 64 L. ed. 213, 214, 40 S. Ct. 116; Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354, 357, 70 L. ed. 305, 308, 46 S. Ct. 149. This is not a case where, as in Saunders v. Shaw. 244 U.S. 317, 320, 61 L. ed. 1163, 1165, 37

S. Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel, Bryant v. Akron Metropolitan Park Dist. 281 U.S. 74, 79, 74 L. ed. 710, 715, 66 A.L.R. 1460, 50 S. Ct. 228. Nor is the federal claim based, as in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L. ed. 1107, 1112, 50 S. Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326."

The case at bar does not come within any of the exceptions to the settled rule. The Supreme Court of New Mexico denied the Motion for Rehearing which first raised the federal constitutional questions without opinion. The decision of the District Court and the decision of the Supreme Court were based upon the same construction and application of New Mexico law. If a federal constitutional question was to be relied upon, it should have been presented to the trial court, and in any event to the Supreme Court of New Mexico upon the appeal and not for the first time upon Motion for Rehearing. There was nothing in the decision of the Supreme Court of New Mexico that could in any manner be said to have produced an unanticipated result.

II

The Issues Involved Are Local in Nature, Applicable Only in the State of New Mexico, and the Judgment Rests Upon an Adequate Non-federal Basis.

An examination of the proceeding will reveal that the issues involved were resolved by the construction of New Mexico law applicable only in the State of New Mexico. The Motion for Rehearing asserts the unconstitutional application of the opinion based both upon the state and federal constitutions. The Motion for Rehearing was denied without opinion and aside from the entirely local nature of the controversy, there is adequate non-federal basis for the action below. *Jankovich* v. *Indiana Toll Road Commissioners,* 379 U.S. 487, 13 L. Ed. 2d 439, 85 S. Ct. 493.

III

The Reasons Advanced by Petitioners for the Allowance of the Writ Do Not Disclose an Issue That Has Importance Outside of the Particular Case and the State of New Mexico.

Petitioners assert three reasons claimed to justify the issuance of the writ. The fact, if it be a fact, Petitioners are financed by the Federal Rural Electrification Administration can have no possible significance in a determination of the rights of the parties to this action. The case certainly does not affect in any manner the ideal of competitive free enterprise. The only issue involved is whether or not a particular customer will obtain electric service from an investor owned public utility operating within its certified area, or one or more electrical co-ops who are limited by charter provisions from serving the entire public.

The second reason advanced certainly fails to convince. There is no way in which a decision in this case

can affect the development of electric cooperatives operating under the New Mexico Rural Electrification Act from performing their intended objective of rural service. The eulogy to the accomplishments of rural electric cooperatives and the fact they are financed by the Federal Rural Electrification Administration cannot affect the right of New Mexico Electric Service Company to render electric utility service in its certified area. The statement that property rights belonging to Petitioners are destroyed is eliminated by the undisputed evidence showing by Finding 9, *supra,* to the effect that regardless of who furnishes the Continental requirements, complete new facilities must be constructed to provide the service.

The third reason advanced relates to the public policy of New Mexico. Petitioners attempt to state the public policy of New Mexico contrary to the decision of the Supreme Court of New Mexico and contrary to the action of the New Mexico Legislature who limited rural electric cooperatives in New Mexico from serving the general public by putting a 10% limitation in the charter of such organizations. *New Mexico Rural Electrification Act,* 45-4-1 *Et Sequa,* N.M.S.A., 1953; *Socorro Electric Cooperative, Inc.* v. *Public Service Company,* 66 N.M. 343, 348 P. 2d 88. The provisions of the New Mexico Public Utility Act prohibiting the extension of public utility facilities so as to interfere with the service of other utilities have been a part of the New Mexico Utility Act since its adoption in 1941. They are not applicable in the case at bar. The District Court and the Supreme Court of New Mexico in the construction and application of these New Mexico statutes simply held that a certified public utility could extend its service within its certified area. This decision does not affect the right of Petitioners to extend

their lines as provided by the Certificate of Convenience and Necessity issued to them under their "grandfather rights" and that right together with the right of New Mexico Electric Service Company co-exist at the point of service in this case.

IV

No Property of Petitioners Has Been Taken Without Due Process, Without Compensation, or in Impairment of Contractual Obligations.

A. As has been stated, the plant of Petitioners heretofore used to provide electric service to the Continental wells must be retired regardless of who provides the service here at issue. Continental will receive service at a central point and will distribute electric energy from that point over its own distribution lines to the wells being served in the water flood project. Facilities of Petitioners heretofore used to pump these wells must be retired in any event and new facilities are required for the purpose of making the deliveries to Continental at the central point of delivery.

1. When Petitioners first began rural electric service in the general area of the Continental service, they were not public utilities and are not now public utilities. They extended their lines under the provisions of the New Mexico Rural Electrification Act without regard to the service area of investor owned utilities. The service here involved is a new service requiring new facilities. The statute which purported to make Petitioners public utilities clearly provided that it would not affect the Certificates of Convenience and Necessity theretofore issued to investor owned utilities, but provided that in the event of an overlap in electric service in any area, both the investor owned

utility and the rural electric cooperative could provide service.

2. It is asserted that New Mexico Electric Service Company's area Certificate was null and void for non-user. This assertion was completely rejected by the New Mexico Supreme Court in the case at bar and by the District Court based upon the record made before the Public Service Commission of New Mexico. The New Mexico Act in respect to Certificates of Convenience and Necessity is not self-executing and an area certificate is valid so long as the public utility holding such certificate continues to extend public utility service in the area of the certificate in good faith and with reasonable diligence. The trial court found in Finding No. 8 that there was no evidence from which it could be found New Mexico Electric Service Company had not at all times constructed and extended its public utility system throughout the area of its Certificate in good faith and with reasonable diligence and under Finding No. 5 that the New Mexico Electric Service Company had at all times provided electric utility service to any person in the area of its Certificate upon demand therefor.

3. It is asserted that under New Mexico law the granting of an area certificate is not authorized by law. The record shows that it has been the consistent practice of the Public Service Commission of New Mexico for many years to grant area certificates and the practice has been approved by the Supreme Court of New Mexico not only in the case at bar, but in the case of *Edington v. New Mexico Public Service Commission,* 74 N.M. 647, 397 P. 2d 300. In this case after the adoption of the 1961 Act an area certificate was granted to a rural electric cooperative in an area

theretofore served by an investor owned utility, and this action was affirmed by the Supreme Court. The application of Lea County Electric Co-op involved in the case of *Lea County Electric Co-op* v. *New Mexico Public Service Commission*, 75 N.M. 191, 402 P. 2d 377, did not hold that an area certificate could not be granted under New Mexico law. It simply held that under the requirements of the 1961 amendment, the Public Utility Act, a rural electric co-op was entitled to a Certificate of Convenience and Necessity for its existing plant, lines and facilities. The record shows in the case here that the Public Service Commission in the granting of the certificate there involved also granted to the co-op the right to extend its service to adjacent territory and customers. They held that the Commission was not required in a case in which application had been made for "grandfather rights" under the 1961 Act to define the area of conflict between the cooperative and the investor owned utility holding a certificate in the area.

4. The assertion that the Public Service Commission of New Mexico had the independent power and duty to prevent unreasonable interference with the plant, lines and facilities of other public utilities would not be applicable at this time in light of the holding of the Supreme Court of New Mexico in *Community Public Service Company* v. *New Mexico Public Service Commission*, 414 P. 2d 675, 76 N.M. ——, that Petitioners were not public utilities. Aside from this holding, the construction of the New Mexico statute by the Supreme Court of New Mexico in this particular affords no basis for federal intervention. The point is an attack upon the correctness of the New Mexico Supreme Court opinion and the opinion of the District Court on a con-

struction of a New Mexico statute under the facts found by the trial court from the record made in this case. Certainly such a point is not a ground for the issuance of a writ of certiorari by the United States Supreme Court to review a decision of a state court of last resort limited to a proper construction of state statutes.

B. Petitioners assert their franchise rights were impaired in violation of Article II, Section 10 of the Constitution of the United States and the Fourteenth Amendment thereto. The franchise rights to which reference is made are those rights granted under the New Mexico Electric Cooperative Act (45-4-1, et sequa, N.M.S.A., 1953), yet the same Act prohibits such a corporation from servicing the general public and permits it only to serve non-members to the extent of 10% of its membership. The terms of this franchise were accepted by Petitioners. They have operated under the terms of this franchise, and certainly cannot object to the limitations thereby imposed upon them.

Nothing prevents the exercise by the Petitioners in this case of the rights granted to them under their Certificate of Convenience and Necessity as that service cannot be had upon the existing lines of the company due to the nature of the service and not to the opinion of the Supreme Court of the State of New Mexico.

V

Petitioners Were Not Denied the Equal Protection of the Law in Violation of the Fourteenth Amendment.

Petitioners and New Mexico Electric Service Company are not on an equal status by reason of the inability of Petitioners under the provisions of their charter to serve the general public. They are not re-

quired to secure Commission approval for the extension of their lines to adjacent territory and have lost no right which was possessed by them. The Supreme Court of New Mexico and the District Court that tried this case only held that New Mexico Electric Service Company as the certified public utility in the area had the right to enter into contracts to provide public utility service in its certified area and that that right could not be destroyed as long as that company exercised that Certificate of Convenience and Necessity with due and reasonable diligence as required by New Mexico law.

The case simply does not apply one set of rules to Petitioners and a different set to New Mexico Electric Service Company. The Judgment of the District Court and of the Supreme Court recognize that both Petitioners and New Mexico Electric Service Company have the right to serve in accordance with the provisions of their Certificate of Convenience and Necessity.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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